THE OLD PENOLOGY AND THE NEW.

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A JUST test of the value of any penal system is found in the quality of its discharged convicts. If a majority of the convicts, who have undergone the discipline prescribed by a prison system, on their discharge return to a life of crime, the fact indicates that the system is defective; and so, *vice versa,* if most of the convicts lead an industrious and law-abiding life after their discharge, the fact speaks well for the system which produces such results. The system is justly judged by what it accomplishes—by its "finished product."

How will the prisons in the United States stand the application of this test?

It is a notorious fact that the most desperate class of criminals in the country consists of discharged convicts. So true is this that, whenever a crime of unusual atrocity shocks the whole community, investigation is very apt to prove that the crime was planned and committed by ex-convicts. And yet not less than ten thousand of these most dangerous criminals are released every year from the prisons of the United States, and turned loose to prey upon the public.

This fact alone is sufficiently appalling, but it is aggravated by a further consideration. A convict undergoing a long term of imprisonment becomes thoroughly known to the prison officers, who are able to form a quite accurate estimate of his character and purposes, and to predict with some confidence whether it is safe to restore him to freedom. These officers may be perfectly sure that the convict, when released from the restraint of the prison, will fall back into crime; nay, more, the convict may openly declare his intention to return to a life of crime, as soon

as he is set free—all this has no bearing upon his absolute right to a discharge. As soon as the term of his sentence expires, he becomes *ipso facto* a free man, no matter how vicious he may be.

I am sure that future generations will inquire with wonder for an explanation of our amazing folly. Why, when we actually held these dangerous criminals in secure confinement, did we open to them the prison gates, although we had every reason to believe that they went forth, not only to plunder and to kill, but, as experts, to train and to lead the whole criminal class?

The answer is exceedingly simple: the indiscriminate discharge of convicts at the expiration of their sentence, without regard to their fitness for freedom, is due entirely to blind adherence to an ancient, but now thoroughly discredited, theory. The theory may be stated thus: the purpose controlling the State in its dealing with the criminal is the infliction of *retributive punishment* for his crime.

This theory has formed the basis of our penal law and, to understand how it has pervaded our whole criminal jurisprudence, it may be useful to glance at the origin of the theory and briefly to trace its historical development.

Human nature is so constituted that a person who suffers injury from a crime committed by another is inflamed with a feeling of resentment against the offender and a passionate desire for revenge. In very early times, the right of private vengeance was recognized by law; it was the right, perhaps the duty, of the person injured and his next of kin to pursue the offender and to inflict summary punishment upon him. At a period still more remote, it may be that the right of punishing crime was vested not only in the sufferer, but in every individual; this would explain the apprehension expressed by Cain, the first murderer, that whoever should find him would slay him. However this may have been, it is certain that early in Saxon history the punishment of crime was committed by law to private vengeance. In the opinion of Professor Green, this was true in the primitive history of all races:

"Among the English, as among all the races of mankind, justice had originally sprung from each man's personal action. There had been a time when every freeman was his own avenger."*

* Green's "History of the English People," Vol. I, p. 9.

Sir James Stephen regards the right of personal vengeance by the injured party as an advance upon the earlier condition, when the duty of inflicting punishment devolved upon every member of the community:

"In early times, the really efficient check upon crimes of violence was the fear of private vengeance, which rapidly degenerated into private war, blood feuds and anarchy. . . . It belongs properly to a period when the idea of public punishment for crimes had not yet become familiar. . . . A single step, but still a step, however short, from private war and blood feuds is made when people are invested by law with the right of inflicting summary punishment on wrong-doers whose offences injure them personally. . . . Of this right of summary execution the Saxon laws are full."†

The exercise of private vengeance, however, was incompatible with the maintenance of public order. It perpetuated family feuds, not unlike those of which we read as even now existing in some of the Southern States of the Union. The legal right of private vengeance was thus, from necessity, abrogated, and, in lieu of it, the duty of punishing crime was transferred to the State. This was upon the theory, then originated, that the State was the party injured by crime, even more than the individual victim of the crime; and, in common conception, the State, in punishing crime, simply took the place previously occupied by the individual sufferer and became the *avenger* of crime.

All the legislation and procedure of that early age which followed the acceptance of this new theory of the State show that vengeance was always the controlling, if not the sole, aim in dealing with criminals. Punishments came into use which were characterized by the cruellest tortures that vindictive malignity could devise. For certain crimes, deemed minor offences, there was established an elaborate system of fines payable both to the State and to the individual injured by the crime. Both the tortures and the fines rested upon the same theory of compensatory or retributive punishment, the aim of which was to inflict upon the convict pain and damage commensurate with the crime.

In the course of time, by the softening influences of Christianity and advancing civilization, physical torture fell into disuse; imprisonment came to be generally adopted as the only punishment

* Stephen's "History of the Criminal Law of England," Vol. I, pp. 59, 61.

for all felonies except capital ones, and fines became applicable to petty misdemeanors. The introduction of imprisonment as the common punishment for all crimes (except the very highest and the lowest) simplified and systematized the penal law. Punishments came to differ only in their *duration*. Applying the same principle of retributive justice, it became necessary to gauge the whole catalogue of crimes according to their several degrees of guilt, and to affix to each crime, as its proper punishment, a stated term of imprisonment. In fixing the duration of such term, the retributive theory required that each convict should remain imprisoned until the sum of the sufferings inflicted upon him was sufficient to compensate and atone for the amount of guilt involved in the particular crime committed by him. This balancing of guilt and punishment was not deemed too difficult or delicate a process to be compassed by general statutes. Codes of criminal law were enacted which contained definitions of the known crimes, and ordained the term of imprisonment for each crime. On the trial of a criminal, after all the testimony was in, the judge had simply to turn to the code, find (from its definitions) the name of the crime proved and the term of imprisonment belonging to it, and then pronounce sentence according to statute. The admeasurement of human guilt became almost as simple as looking up a word in a dictionary.

Centuries ago, the criminal law reached the stage of development here indicated. It remained, unchanged in theory and principle, down to the present age, the embodiment of what may be called "The Old Penology." Within the past generation, certain changes have been proposed and in part adopted, which overturn the foundations and whole superstructure of the old criminal law. These changes are of a nature so radical that they may justly be said to have created a "New Penology."

In order to illustrate the sharp contrast between the old and the new, note four cardinal features of the old system:

1. The theory of *retributive punishment* lay at the very foundation of the whole system. The only aim of imprisonment was to make the convict suffer for his wrong-doing.

2. The length of the sentence was to be proportioned in each case to the degree of guilt indicated by the crime committed. This led to the creation of penal codes which assumed to gauge the relative amounts of guilt involved in the various crimes.

3. This adjustment of punishment to guilt took place at the conclusion of the trial, and sentence was then pronounced fixing *in advance* the term of imprisonment.

4. As a corollary from what has preceded, when the convict had served his allotted term of imprisonment he was held to have expiated or atoned for his crime; "justice was satisfied," and the convict became absolutely entitled to be restored to freedom, as if he had never committed a crime.

Each and all of these four elements of the old system the new penology rejects and utterly condemns. The theory of retributive punishment cannot be reconciled with any true conception of the function of civil government. The State exists mainly for the *protection* of its people; to remove obstructions which impede progress and which hamper freedom is its highest care. Defence of the public, and not vengeance on the criminal, is the only legitimate aim of the State in dealing with crime. Revenge, not a worthy motive for an individual, is wholly foreign to the majesty of the State. When the State imprisons a criminal, its action is governed by precisely the same reasons that lead it to hold in quarantine a ship bearing contagion, or to confine in an asylum a lunatic affected with homicidal mania. A criminal is, in like manner, a public menace and danger; it is not safe for the public that he should be at large. This reason alone justifies the State in depriving him of his freedom.

If, then, the convicted criminal is imprisoned as a measure of public safety, the same consideration alone should determine the duration of his imprisonment. The amount of his guilt is a psychological problem that Omniscience only can possibly solve; it has no bearing at all on the practical question, How long shall he be kept in prison? The same motive of public protection that first sent him to prison demands that he should remain there until his release becomes consistent with public safety.

But how can the release of a criminal ever become consistent with public safety, unless he shall have undergone a transformation of character? His predatory purposes must be supplanted by habits of industry, self-respect and respect for law, a worthy regard for the good opinion of men, higher ideals and new conceptions of justice and of honor: in a word, normal views of life must gain possession of the man and develop power of self-control in the place of blind passion. This is what *reformation*

means; this is what modern methods of reformatory prison training and discipline have actually accomplished. Popular opinion is sceptical about the possibility of reforming criminals, but the scepticism rests upon ignorance of what has been achieved. The modern system of reformative treatment may be fairly said to have originated in the Elmira Reformatory thirty years ago; since that time, the system has been experimentally developed and improved in that and other reformatories with most striking results. A large majority of all the felon convicts treated under this system have acquired both the purpose and the power to abstain from crime.

Imprisonment protects the public so long as it continues; reformation makes the protection permanent. The New Penology, of which the key-note is public protection, demands, therefore, that the reformative system shall be introduced and administered in all prisons, and that no convict shall be discharged from prison until he is fitted for freedom. No convict is fitted for freedom while he remains under the dominion of criminal purposes and lacks either the desire or the power to subdue them.

How long a course of reformative treatment may be required to effect the desired result will vary according to the character and temperament of each individual convict. To fix its duration in advance—to make the term of the imprisonment a part of the sentence of conviction—is not less irrational, and even absurd, than would be the commitment of a smallpox patient to a hospital for just ten days, or sending a violent lunatic to an asylum for exactly one year. The patient, the lunatic, the criminal, must all be confined and treated until *cured,* be the time required more or less. To meet this exigency, the New Penology has devised the Indeterminate Sentence for crime, by which the prisoner, upon conviction, is sentenced simply to imprisonment; no term is fixed, but the prisoner is to be released only upon the decision of a competent board that he has gained both the purpose and the ability to lead a law-abiding life.

A reformative system of training is the indispensable complement of the Indeterminate Sentence. The prisoner is thus left to work out his own salvation; the strongest incentive—the love of freedom—appeals to him to accept the situation and cordially to respond to the elevating and strengthening discipline to which he is subjected, until at last his criminal purposes come to be

supplanted by worthy motives and dawning aspirations toward true manhood.

The Indeterminate Sentence, moreover, reverses the attitude of the State toward the criminal. Under the retributive system, the convict regards the State as a relentless enemy, vindictively inflicting pain and suffering upon him and finally casting him forth only when its vengeance is sated. The Indeterminate Sentence presents the State to the convict as a beneficent power, striving to uplift him and plying him with influences and agencies which aim only at his rehabilitation.

It is not easy to understand how the endurance of retributive punishment came to be regarded as an expiation or atonement for the crime thus punished. Suffering voluntarily endured or reparation voluntarily made, if prompted by sorrow and repentance, may be accepted as expiation of an offence committed; but the expiatory virtue of such suffering consists wholly in its voluntary and repentant character. That suffering compulsorily inflicted and borne with defiance should be deemed an atonement for crime passes comprehension. But this absurd fiction is the only ground on which dangerous criminals are discharged as soon as the term of their sentence, fixed in advance, expires.

The advocates of the New Penology are now concentrating effort to secure the incorporation into criminal jurisprudence of two measures, both of controlling importance:

I. That all prisons for convicts shall be operated under a reformatory system of training and discipline, forming in the convict habits of industry and of correct living, and surrounding him with helpful and uplifting influences, so that every prisoner shall be given a chance to reform.

II. That to prisons thus equipped and administered all prisoners shall be sent under an indeterminate sentence, the essential principle of which is that no prisoner shall be released until he is fitted for freedom.

Both are demanded as measures of sound policy for public protection against crime; and the demand is made doubly imperative because it is in harmony with the spirit of true Christian philanthropy.

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